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No. 95-2074

Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS

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QUESTIONS PRESENTED

Amicus curiae State of Texas will address the following question (question "2." as set forth in the *Brief of Petitioner*):

> Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

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INTEREST OF AMICUS CURIAE STATE OF TEXAS

The State of Texas files this *amicus curiae* brief on behalf of the state and its citizens in order to protect the Free Exercise rights of its citizens under the First Amendment (as incorporated into the Fourteenth Amendment) and the Religious Freedom Restoration Act.

SUMMARY OF ARGUMENT

The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution establish the appropriate balance between the federal and state governments, *i.e.*, appropriate federalism. Appropriate federalism (or, as referred to herein, the Federalism Framework), however, is not aimed at merely protecting the rights and powers of states *qua* states, or to protect states as abstract entities. Rather, it seeks to protect the fundamental rights and liberties of our citizens by checking the abuses of governmental power at any level.

The Fourteenth Amendment fundamentally altered the balance between the federal and state governments. It did so, however, in order to provide further protection for the rights and liberties of our citizens.

Nonetheless, not all legislation putatively passed pursuant to the Fourteenth Amendment is constitutional. Legislation that violates other provisions of the Constitution, or violates the "spirit" of the Constitution is unconstitutional.

The Religious Freedom Restoration Act ("RFRA") was passed in 1993 pursuant to the Fourteenth Amendment. Congress sought to reestablish the "strict scrutiny" test for governmental action that affected the free exercise rights of our citizens. According to Congress, the Court had eviscerated this test in *Employment Division v. Smith* in 1990.

Petitioner has argued, *inter alia*, that RFRA violates federalism by overriding the will of duly elected local officials and commandeering state resources to fulfill federal policy. The State of Texas files this *amicus* brief because it believes that RFRA does not violate the "letter

or spirit" of the Constitution. It certainly does not commandeer state resources to effectuate federal policy. Rather, it assures that the promise of this country to generations of immigrants regarding religious freedom remains untrammeled by government at any level -- federal, state, or local.

Thus, RFRA does not violate our federalism. Rather, it fulfills the ultimate objective of federalism, *i.e.*, the protection of the fundamental rights and liberties of our citizens.

ARGUMENT

Background

Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993.[1] Essentially, RFRA reestablished the "compelling interests"/ "least restrictive means" test (*i.e.*, the "strict scrutiny" standard of review of governmental action) set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972).

Under this standard of review, with regard to zoning disputes, such as the one at issue in this case, the courts had established an increased scrutiny test for determining when governmental action unconstitutionally impacts on First Amendment rights. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, 103 S.Ct. 505, 509-510 (1982); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 n.7, 101 S.Ct. 2176, 2183 n.7 (1981)("When . . . a zoning [law] infringes upon [a protected] first amendment [liberty], . . . it must be narrowly drawn [and must further a sufficiently] substantial government interest."). *See Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi*, 840 F.2d 293, 299 (5th Cir. 1988).

According to the text[2] and legislative history of RFRA, the enactment of RFRA was prompted by the Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110

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[1] 42 U.S.C. § 2000bb, *et seq.* (1993).

[2] 42 U.S.C. § 2000bb(a)(4).

S.Ct. 1595 (1990). That decision, according to Congress, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. . . ."[3]

Furthermore, according to legislative history, RFRA was enacted pursuant to Section 5 of the Fourteenth Amendment.[4] Nothing in the *text* of RFRA, however, states that it was enacted pursuant to the power of Congress provided for by Section 5 of the Fourteenth Amendment.

In attempting to have RFRA set aside as unconstitutional, Petitioners argue, *inter alia*, that RFRA:

> . . . is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. Thus, it violates core constitutional principles of federalism in the Tenth Amendment. [citation omitted.] Congress is a body of enumerated powers, and it must respect state integrity in that exercise. [citations omitted] . . . Congress has done in RFRA what--in our constitutional scheme--only the states may do themselves . . . Because of its expansive sweep, RFRA colors every dealing a state or municipality has with every religious believer, church, or religious organization.[5]

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[3] *Id.*

[4] *See* H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993); S. Rep. No. 111, 103d Cong., 1st Sess., at 13-14 (1993), *reprinted* in 1993 U.S.C.A.A.N. at 1903.

[5] *Petition for Certiorari*, pp. 7 to 10.

Furthermore, in Section 3 of Part II of the *Brief of Petitioner*, Petitioner argues that RFRA "violates the principles of federalism reflected in the Tenth Amendment and operating as an inherent constitutional limitation on the exercise of Section Five authority against the states." *Brief of Petitioner* at 46.

State of Texas files this *amicus* brief in order to respond to these federalism arguments. Texas has a great concern about the proper application of the doctrine of federalism.[6] The State's concern about appropriate federalism, moreover, is at its apogee when Congress putatively acts pursuant to its powers under Section 5 of the Fourteenth Amendment and its actions impact upon state sovereignty and state and local self-government.

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[6] For example, the State has spent enormous resources during the past five years to ensure that federal bureaucrats and federal judges do not take control--pursuant to over expansive views of the Endangered Species Act --of the water and land resources owned by Texas citizens and managed in accordance with the will of Texas citizens and the Texas legislature. *See Sierra Club v. Babbitt*, 995 F.2d 571, *Sierra Club v. Glickman*, 82 F.3d 106, *State of Texas v. Babbitt*, No. W94CA271 (U.S.D.C. filed Sept. 30, 1994), *SOS v. Babbitt*, No. MO95CA230 (U.S.D.C. filed Oct. 20, 1995).

Also, the State has sought to ensure that the federal government, and not the state government or its citizens, pays the costs of the federal government's failed immigration policies and failure to responsibly reimburse state and local governments for the costs associated with illegal immigration. *See State of Texas v. United States*, 1996 WL 411490 (D.D.C. July 15, 1996), appeal pending.

Texas' defense of federalism has not been undertaken because of theoretical or abstract "states' rights" reasons or motives, but rather because of the State's deep concern that the rights and powers of Texas citizens (such as our citizens' property rights or their right to elect officials who can be held accountable to them and who reflect their concerns and viewpoints) not be needlessly eviscerated by overreaching federal officials or by the federal judiciary over-expansively reading federal laws and regulations.

In this case, however, Texas does not agree that there are sufficient negative impacts on state self-government that justify a lower level of constitutional protection for our citizens as they seek to freely exercise their First Amendment religious rights. It can be discerned when state sovereignty and self-government are truly at risk and when they are not. With all due respect to our sister states who argue differently, and, indeed, to the Petitioner, they are not at stake in this case.

RFRA does not unconstitutionally impinge on state and local self-government. Despite assertions to the contrary, state and local self-government will not grind to a halt if state and local governments remain duly solicitous of our citizens right to worship. State and local governments, furthermore, will not be courting "anarchy"[7] by following a careful course of utmost scrutiny as they undertake governmental action that impacts upon religious worship.

In this case, Texans' right to worship and to freely exercise their religion is being protected by RFRA and there are no correlative "commandeerings" of state or local governments that run afoul of the "Federalism Framework" described *infra*.

Furthermore, RFRA-based lawsuits in the larger context are not an onerous set of lawsuits with which to deal. In general, the State of Texas Office of the Attorney General handles approximately 26,000 active cases at any one time. Of these, approximately, 2200 are inmate-related, non-capital punishment cases. Of these 2200 inmate-related cases, approximately 60 are RFRA-related. Thus, RFRA-related cases represent .23 percent (that is, one-quarter percent) of the entire caseload of the Texas Attorney General's office, and about 2.7 percent of the inmate-related (non-capital punishment) caseload of the State of Texas. Moreover, of

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[7] *See Employment Division v. Smith*, 494 U.S. at 888, 110 S.Ct. at 1605.

the approximately 60 RFRA-related cases, many of these are frivolous to be dispensed summarily.

To be sure, Texas remains concerned about frivolous lawsuits brought by inmates. Convicts in prisons, however, will always find other bases for bringing junk lawsuits. The free exercise rights of millions of Texans, in any event, should not be held hostage to a few dozen convicts looking for excuses to bring a lawsuit.[8]

Furthermore, Texas notes that RFRA, by reestablishing the compelling state interest/least restrictive means test, preserves the ability of Texas to administer its prison program in a way that will ensure that the health and safety of prison officials and convicts will be protected. Strict scrutiny in the prison context will not be "fatal" scrutiny in fact.[9]

Lastly, it is critical to note that RFRA does not present an absolute bar to the application of state and local governmental regulations and law to religious entities. It only reestablishes the strict scrutiny test *ante Employment Division v. Smith*. As noted earlier, under RFRA, governmental regulations that apply to religious entities must serve a compelling purpose and be found to use the least restrictive means to accomplish their purpose.

Regulations that are at the core of governmental legislation such as building codes, electrical codes, plumbing codes, health codes, and traffic regulations are not *a fortiori* invalid under the standard. These type of regulations by their very nature and relation to public safety may be found by the courts to serve a compelling public interest.

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[8] Texas obviously acknowledges that there *may* be legitimate bases for incarcerated individuals bringing RFRA-based lawsuits.

[9] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, __, 115 S.Ct. 2097, 2118 (1995).

Local governments can also generally show a compelling interest for other regulations that implicate health and safety concerns such as setback requirements that allow public access to properties in case of emergencies. *See City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923 (Tex.Civ.App.--Corpus Christi 1968, writ. ref'd n.r.e.).

In sum, it is important to recognize that this Court has "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact.' [*Fullilove v. Klutznick*, 448 U.S. 448, 519 100 S.Ct. 2758 (1980)(MARSHALL, J., concurring in judgment)]." *Adarand Constructors, Inc. v. Pena*, 515 U.S. at ___, 115 S.Ct. 2097, 2117.

I. THE FEDERALISM FRAMEWORK: THE TEXT AND STRUCTURE OF THE CONSTITUTION, AS AMENDED BY THE TENTH AMENDMENT, ESTABLISH THE APPROPRIATE BALANCE BETWEEN THE FEDERAL AND STATE GOVERNMENTS.

The question with respect to the appropriate balance of power between the states and the federal government is "as old as the Constitution." *New York v. United States*, 505 U.S. 144, 148, 112 S.Ct. 2408, 2414 (1992). The United States is a government of limited, enumerated powers. *United States v. Lopez*, 514 U.S. ___, ___, 115 S.Ct. 1624, 1626 (1995). *See* U.S. CONST., ART I. § 8.

On the other hand, the myriad rights and powers of the states are preserved textually by the Tenth Amendment[10]

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[10] The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

and the Guarantee Clause,[11] as well as embedded in the structure of the Constitution.[12] By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution establishes a framework in which the states retain "substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399 (1991). *See Oregon v. Mitchell*, 400 U.S. 112, 201, 91 S.Ct. 260, 303 (1970)(HARLAN, J.)("When the Constitution with its original Amendments came into being, the States delegated some of the sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amdt. X.")

In *New York v. United States* 505 U.S. at 156, 112 S.Ct. at 2417, the Court set forth the significance of the Tenth Amendment:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

In *New York v. United States*, the Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[13] because the provision

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[11] U.S. CONST. art. IV, § 4 (the "Guarantee Clause"), provides that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

[12] *See Nevada v. Hall*, 440 U.S. 410, 433, 99 S.Ct. 1182, 1194 (1979) (REHNQUIST, J., joined by BURGER, C.J., dissenting).

[13] Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021b(1988).

commanded states either to enact laws regulating the disposal of low-level radioactive waste or to take title to all low-level radioactive waste generated within their borders.

The Court in *New York* distinguished firmly between Congressional power "to pass laws requiring or prohibiting certain acts" by private parties and congressional attempts "to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166, 112 S.Ct. at 2423.[14] Congress does not have the power to compel state governments to do certain things or to take certain actions. Congress, furthermore, cannot commandeer state governmental power to act in lieu of the federal government. While those propositions should have been self-evident for some time, they were not clearly reaffirmed until the *New York* case.

The Guarantee Clause furthermore ensures that state governments are held accountable to the citizens of the respective states with respect to fundamental decisions about how to allocate, control, and use resources and define, maintain, protect, or regulate the rights and powers of its citizens.[15] The essence of a "republican form" of government is a close fit between the choices and desires of citizens and the actions and decisions of the officials they elect. That is, the accountability of elected officials to the electorate is the *sine qua non* of a republican form of government.

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[14] Deborah Jones Meritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 815, 818 (1994).

[15] In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742,761, 102 S.Ct. 2126, 2138 (1982), the Supreme Court acknowledged that "the authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty. [citation omitted]. *FERC* 456 U.S. at 761, 102 S.Ct. at 2138. The Court stated further: Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. [citation omitted]. *Id.*

Federal mandates, whether from Congress in the form of legislative enactments or decreed by administrative fiat in the form of agency action, may sever the link between the citizens of a state and their elected officials. If the federal government does sever that link, then the federal government not only has failed its constitutional duty to protect the states' republican form of government, it has necessarily impinged upon the states' right to a "republican form" of government guaranteed by the Constitution.

The vitality of the Guarantee Clause in bolstering the Federalism Framework (described *supra*) was renewed in *New York,* in which the Court acknowledged that the Guarantee Clause could be used to protect states from an over-intrusive federal government. *New York,* 515 U.S. at 182-183, 112 S.Ct. at 2432-33. Actions brought by states to protect their sovereignty and which allege violations of the Guarantee Clause cases are justiciable. *See Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392 (1964) ("*some* [not all] questions raised under the Guaranty Clause are nonjusticiable.")(emphasis added).

The reinvigoration of the Guarantee Clause, and whether it is enforceable has recently been the subject of much academic discourse. *See* Jesse H. Choper, *Observations on the Guarantee Clause - As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 UNIV. OF COLO. L. REV. 741 (1994); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 UNIV. OF COLO. L. REV. 749 (1994); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 815 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 UNIV. OF COLO. L. REV. 849 (1994); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 887 (1994).

II. The Ultimate Objective of the Federalism Framework: Protecting the Fundamental Rights and Powers of Citizens.

It is critical to note that preserving the Federalism Framework as described *supra* is not simply an abstract "states' rights" goal. Rather, as the Court has recognized, the Federalism Framework protects the fundamental rights and powers of citizens. "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400 (1991)." *United States v. Lopez*, 514 U.S. at 1626.

In *Gregory*, the Court stated:

> "Perhaps the principal benefit of the federalist system is a check on the abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[16]

And in *New York v. United States*, 505 U.S. at 181, 112 S.Ct. at 2431 (citations and quotation marks omitted) (emphasis added), the court stated:

> The Constitution does not protect the sovereignty of the States . . . or state governments as abstract political entities, or

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[16] *Gregory* at 458. The Court relied heavily upon Nos. 28 (Hamilton) and 51 (Madison) of THE FEDERALIST (C. Rossiter, ed. 1961).

> even for the benefit of the public officials governing the States. *To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.* State sovereignty is not just an end in itself. "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." [citation omitted].

Furthermore, as noted by Justice Blackmun in *Coleman v. Thompson*, 501 U.S. 722, 760-761, 111 S. Ct. 2546, 2570 (1991) (1991)(BLACKMUN, J. dissenting):

> . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions.' (quoting William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961)).

Moreover, with regard to the Guarantee Clause, although the promise of the Guarantee Clause appears on its face to flow to the states *qua* the states, the Court has stated that the beneficiaries of the guarantee are the people. *Texas v. United States*, 74 U.S.(7 Wall.) 700 (1869). *See* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 UNIV. OF COLO. L. REV. 887, 920 (1994).

III. The Fourteenth Amendment Was Intended to Advance the Ultimate Objective of Federalism.

The Federalism Framework protects the rights and liberties of our citizens by ensuring the appropriate balance of power between the state and federal governments. Against the original framework of the Constitution (including the Guarantee Clause) and the Bill of Rights (including the Tenth Amendment), as well as against the backdrop of the Civil War, the Fourteenth Amendment fundamentally altered the balance between the federal and state governments. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1125 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 109 S.Ct. 706, 720 (1989); *Fitzpatrick v. Blitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671 (1976). This alteration, nonetheless, was meant to provide more protection for fundamental liberties and rights of our citizens. From this perspective, the Fourteenth Amendment furthers the ultimate objective of federalism.

The Fourteenth Amendment "contained prohibitions expressly directed at the States and § 5 of the Amendment expressly provided that 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article' [citation omitted]." *Seminole Tribe* at 1125.[17] Indeed, the Court has stated that the Fourteenth Amendment was one of three constitutional amendments[18] that "were specifically designed as an expansion of federal power and

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[17] The Court went on to state: "[T]hat through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole* at 1125.

[18] The others being the Thirteenth and Fifteenth Amendments.

an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179, 100 S.Ct. 1548, 1563 (1980).

While RFRA was putatively enacted pursuant to the Fourteenth Amendment,[19] Congress did not expressly state in the act itself that it was acting pursuant to that constitutional provision. That is unfortunate, but not fatally defective to the legislation. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18, 103 S.Ct. 1054, 1064 n.18 (1983) (legislation enacted pursuant to Congress' Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of the power."); *see also Fullilove v. Klutznick*, 448 U.S. 448, 477, 100 S.Ct. 2758, 2774 (1980) (plurality).[20]

While the Court has fortunately (from the state perspective) been moving toward "plain statement" or "clear

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[19] While the text of RFRA does not formally set forth the ostensible power being relied upon by Congress to enact RFRA, RFRA's legislative history indicates that Congress relied upon the Fourteenth Amendment to enact RFRA. S. Rep. No.111, 103d Cong., 1st Sess., 13-14 (1993), reprinted in 1993 U.S.C.A.A.N. 1892; H.R. No. 88, 103d Cong., 1st Sess. 9 (1993).

[20] *See United States v. Lopez*, 514 U.S. at __, 115 S.Ct. at 1631-1632, with respect to whether certain activities affected interstate commerce, the Court stated:

> We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. [citations omitted.] But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

statement" rules in a number of contexts[21] in order to ensure, *inter alia*, political accountability of the federal government, there appears to be no requirement at this time that Congress must clearly set forth the basis of its power to enact certain legislation in the legislation itself.

IV. Despite The Ultimate Objective of the Fourteenth Amendment To Protect Fundamental Rights and Powers of Our Citizens, It Does Not Provide Carte Blanche To the Federal Government To Run Roughshod Over State and Local Governments.

While the Fourteenth Amendment clearly readjusted the balance of power between state governments and the federal government,[22] the Court has recognized that the

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[21] *See Gregory v. Ashcroft*, 501 U.S. 452, 460-461, 111 S.Ct. 2395, 2401 (1991)("We explained recently: '[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must [do so] 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, [105 S.Ct. 3412, 3147, 87 L.Ed. 2d 171] (1995); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [104 S.Ct. 900, 907, 79 L.Ed. 2d 67] (1984).").

With respect to Eleventh Amendment state sovereignty abrogation issues, the Court has declared that "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' [*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578, 2584 (1991)]." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. at 1123.

[22] Actually, the Fourteenth Amendment specifically expanded the power of *Congress*. "It is not said [in section 5 of the Fourteenth Amendment] the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . .

Fourteenth Amendment does not override all principles of federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 468, 111 S.Ct. 2395, 2405 (1991). As the Court stated: "[T]his Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers." *Id.*

In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970), Justice Black explained that Congress' enforcement power under Section 5 of the Fourteenth Amendment, while broad, is not unlimited and set forth a three-part test for analyzing the power of Congress under the Fourteenth Amendment:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'

Id. at 128-29, 91 S.Ct. at 266-267 (opinion of BLACK, J.). *See also State of South Carolina v. Katzenbach*, 383 U.S. 301, 325, 86 S.Ct. 803, 816-817 (1966).

It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1879)(emphasis added in part).

In *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724 (1966), the Court had set forth a simpler two-part test. As described in *City of Rome*, 446 U.S. at 176, 100 S.Ct. at 1561:

> In [*Katzenbach*], the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment [1] 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and [2] 'is not prohibited by but is consistent with 'the letter and spirit of the constitution,'. . . (quoting *McCulloch v. Maryland*, [4 Wheat. 316, 421, 4 L.Ed. 579 (1819)].

In this case, the Fifth Circuit Court of Appeals appropriately adopted the *Morgan/Mitchell* analysis in order to evaluate whether Congress had the constitutional authority to enact RFRA, aimed as it is at enforcing § 5 of the Fourteenth Amendment. *P.F. Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1358 (5th Cir. 1996). In analyzing whether legislation, such as RFRA, ostensibly passed pursuant to the Fourteenth Amendment, is constitutional, the Court must consider the following factors:

> (1) First, the statute under consideration must be "'regarded' as an enactment to enforce the Fourteenth Amendment";
>
> (2) Second, the statute must be "plainly adapted" to enforce the Amendment. *Id.* at 1359; and
>
> (3) Finally, the statute must be "consistent 'with the letter and spirit of the constitution.'" *Id.* at 1361.

An analysis of RFRA indicates that the statute does not fail any of the parts of the *Morgan/Mitchell* factors.

V. Because RFRA Is Consistent With the Federalism Framework, As Well as With the Ultimate Objective of The Federalism Framework, RFRA is Consistent with the Letter and Spirit of the Constitution With Regard to Federalism Issues.

According to the legislative history of RFRA, RFRA was passed pursuant to the Fourteenth Amendment.[23] Assuming *arguendo* that RFRA, furthermore, is "plainly adapted" to meet the purposes of the Fourteenth Amendment, there remains only the issue of whether RFRA "is not prohibited by but is consistent with the 'letter and spirit of the constitution.'" *City of Rome*, 446 U.S. at 176, 100 S.Ct. at 1561 (quoting *McCulloch v. Maryland* at 421).[24]

More specifically, the appropriate inquiry with respect to the federalism issues in this case is whether RFRA violates any textual provision of the Constitution or the inherent structure of the Constitution as described in Section I, *supra*. The inquiry into the issue whether Congress has the authority (*vis à vis* the states) under the Fourteenth Amendment to enact RFRA is the "mirror image" of the issue whether certain sovereignty rights and powers of the states have been impinged upon by Congress in enacting RFRA. *See New York*, 505 U.S. at 156, 112 S.Ct. at 2417.

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[23] *See* fn. 4 *supra*.

[24] It is to be noted that Texas does not take a position as to whether RFRA violates separation of powers principles at the federal level.

Petitioner argues strenuously that the limits on the federal government flowing from the Federalism Framework described *supra*:

> . . . are transgressed by RFRA. Tests of compelling interest and least restrictive means dramatically skew the balance of power between local governments and churches on land use issues, including historical preservation, to the detriment of this traditional area of local autonomy. *See* Cert. Pet. at 6-7. In the end, RFRA tips "the scales too far" in favor of the federal government and in derogation of the states. [citations omitted]. *Brief of Petitioner* at 45.

RFRA, however, does not transgress textual or structural limits on the federal government contained in the Constitution. Indeed, RFRA, because it is intended to protect a fundamental right or liberty of our citizens, can be characterized as fulfilling the ultimate objective of the Federalism Framework as described *supra*.

A. There Are No State or Local Government Interests That Are Needlessly, or Unconstitutionally Sacrificed by RFRA.

RFRA *appears* to implicate two sets of issues impacting on appropriate federalism, or rather on the appropriate balance between state and federal governments.

1. State and Local Governments' Right and Power to Protect, Maintain, and Regulate Property.

There is little doubt that, with regard to protecting citizens' property and self-governing rights and powers, state and local governments are responsible and "charged" under the Federalism Framework with enacting, maintaining, and enforcing laws that protect and regulate property.

"'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.' *Board of Regents of State Colleges v. Roth*, 408 U.S. 574, 577, 92 S. Ct. 2701, 2709, 33 L.Ed. 548 (1972). [other citations omitted]." *Delaware v. New York*, 507 U.S. 490, 501-502, 113 S. Ct. 1550, 1557 (1993).[25]

Furthermore, pursuant to the police power reserved to the states and protected by the Constitution, state and local governments are particularly responsible and entitled to enact, maintain, and enforce laws governing the use of land, water, and resources such as laws regarding zoning, including zoning to protect historical structures, and land use planning.[26] There is much interplay between these two sets of powers reserved to

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[25] Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982).

[26] With respect to zoning, this Court has stated "[Z]oning laws and their provisions. . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18, 95 S.Ct. 2197, 2210, n.18 (1975). And with regard to land use planning, this Court has stated: "[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Reality Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)." *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994).

Indeed, the Court has recognized that the states' land use planning powers are formidable even as against the federal government. In *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 593, 107 S.Ct. 1419, 1431 (1987), the Court stated: "[T]he Property Clause gives Congress plenary power over the federal land at issue; however, even within the sphere of the Property Clause, state law [*i.e.*, the state land use planning law at issue] is preempted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.' [citation omitted]."

state and local government. But RFRA does not impinge upon these two important powers of state and local governments.

Nothing in RFRA commands states to do anything with regard to defining, maintaining, or protecting property rights. Nothing in RFRA diminishes the powers of state and local government with respect to defining, maintaining, or regulating property.

Nothing in RFRA, moreover, commands states or local governments to zone, regulate, or manage land or other resources in certain ways. And, finally, nothing in RFRA "commandeers" or "hijacks" state or local government processes with respect to regulating the use of property.

To be sure, any governmental action (by any level of government, including the federal government) regarding the definition, use, or regulation of property must be done in accordance with the First Amendment, but that has been required since the enactment of the Constitution and the Bill of Rights.

2. Ensuring Accountability Between Governmental Officials and Citizens.

The Federalism Framework serves as a bulwark against an encroaching federal government intent on accomplishing objectives by turning state and local governments into "field offices"[27] of the national government. ". . . Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal

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[27] "State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes." FERC, 456 U.S. at 777, 102 S.Ct. at 2147 (O'CONNOR, J., BURGER, C.J., REHNQUIST, J., dissenting).

regulatory program.' *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S. Ct. 2352, 2366, 69 L.Ed.2d 1 (1981)." *New York*, 505 U.S. at 161, 112 S.Ct at 2420.[28] The danger avoided by ensuring that state and local governments do not become "field offices" of the national government is the danger that accountability between governmental officials and our citizens will be lost. *New York*, 505 U.S. at 168-169, 112 S.Ct. at 2424.

But, again, RFRA commandeers nothing. It only mandates solicitude for our churches and their members' worship by our state and local governments as they undertake action that affects churches and their members. Our state and local governments did not grind to a halt when they had to meet the strict scrutiny test before 1990 and the *Employment Division v. Smith* decision, and there is no reason to believe that they will grind to a halt now because of RFRA.

RFRA does not decree that state and local governments expend funds, political goodwill, or administrative program resources in the pursuit of a federal objective or program. RFRA simply ensures that our citizens right to worship will only be sacrificed for a compelling interest and only if the least restrictive means to achieve that compelling interest are chosen. As stated by Judge Posner in *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996):

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[28] The Court went on to state:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York, 505 U.S. at 161; 112 S.Ct. at 2420.

> [RFRA] does not impose substantial direct costs on the states . . . because it makes an exception for regulations that are necessary to the furtherance of compelling state interests. It does not enlist state officials as federal functionaries. It does not make the states dance to a federal tune beyond requiring them to accord a limited measure of protection to religious interests that may not be represented in the politics of the state.

CONCLUSION

In order to protect the property and associated rights of our citizens on one hand and to ensure that any regulation and protection of that property is done in accord with the will of the citizenry, and in order to ensure accountability of governmental officials to the electorate, the Constitution has established a balance by which state and local governments act as barrier against a distant federal government which may inadvertently or purposefully overreach and diminish the rights and powers of citizen. When, however, that federal government "ratchets up" protection for the fundamental rights of our citizens, as Congress did in this case, the concern about an overreaching, distant government dissipates and concerns about appropriate federalism evaporate.

The Court should rule that RFRA does not violate essential notions on tenets of federalism.

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